UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JARED GREEN, Petitioner, v. RANDY GROUNDS, Respondent.	NO. CV 11-2722-JST(E) ORDER ADOPTING FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. section 636, the Court has reviewed the Petition, all of the records herein and the attached Report and Recommendation of United States Magistrate Judge. The Court approves and adopts the Magistrate Judge's Report and Recommendation.

IT IS ORDERED that Judgment be entered denying and dismissing the Petition with prejudice.

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IT IS FURTHER ORDERED that the Clerk serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein on Petitioner, Petitioner's counsel, and counsel for Respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: October 26, 2011.

JOSEPHINE STATON TUCKER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JARED GREEN, Petitioner, v. RANDY GROUNDS, Respondent.	NO. CV 11-2722-JST(E) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Josephine Staton Tucker, United States District Judge, pursuant to 28 U.S.C. section 636 and General Order 05-07 of the United States District Court for the Central District of California.

PROCEEDINGS

Petitioner filed a "Petition for Writ of Habeas Corpus By a Person in State Custody" on March 31, 2011, accompanied by a "Supplement to Petition for Writ of Habeas Corpus, etc." ("Pet. Supp."). Respondent filed an Answer on May 26, 2011. Petitioner filed a Reply on July 29, 2011.

BACKGROUND

The State charged Petitioner and his co-defendant, Bobby Lee Todd, with assault by means likely to produce great bodily injury upon Yoon Chae Kim in violation of California Penal Code section 245(a)(1) (Clerk's Transcript ["C.T."] 44-46). The State also charged Todd with misdemeanor vandalism (C.T. 44-46). Prior to trial, Todd pled guilty pursuant to a plea agreement (see Reporter's Transcript ["R.T."] E-13-15, 391, 474).

A jury found Petitioner guilty on the assault charge (R.T. 269-70; C.T. 105). The court found true the allegation that Petitioner had suffered a prior felony conviction qualifying as a "strike" within the meaning of California's Three Strikes Law, California Penal Code sections 667(b) - (i) and 1170.12(a) - (d) (R.T. 550; C.T. 311).[1] The court imposed a low term sentence of two years, doubled pursuant to the "one strike" provisions of the Three Strikes Law,[2] for a total term of four years (R.T. 676; C.T. 387-88).

The California Court of Appeal affirmed the judgment (Respondent's Lodgment 4; see People v. Green, 2010 WL 2220062 (Cal.

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[1] The Three Strikes Law consists of two nearly identical statutory schemes. The earlier provision, enacted by the Legislature, was passed as an urgency measure, and is codified as California Penal Code §§ 667(b) - (i) (eff. March 7, 1994). The later provision, an initiative statute, is embodied in California Penal Code § 1170.12 (eff. Nov. 9, 1994). See generally People v. Superior Court (Romero), 13 Cal. 4th 497, 504-05, 53 Cal. Rptr. 2d 789, 917 P.2d 628 (1996). Petitioner was sentenced under both provisions (see C.T. 388).

[2] See Cal. Penal Code §§ 667(e)(1), 1170.12(c)(1).

App. June 4, 2010)). The California Supreme Court denied Petitioner's petition for review summarily (Respondent's Lodgment 8).

SUMMARY OF TRIAL EVIDENCE

The following summary is taken from the opinion of the California Court of Appeal in People v. Green, 2010 WL 2220062 (Cal. App. June 4, 2010). See Slovik v. Yates, 556 F.3d 747, 749 n.1 (9th Cir. 2009) (taking factual summary from state appellate decision).

> Kim [the victim] worked at a 7-Eleven store on North Cahuenga Boulevard in Hollywood. On April 28, 2008, at 2:15 p.m., he was the cashier. A customer, Bobby Todd, requested a cup of ice. When Kim told him it cost 50 cents, Todd said he only had a quarter, which he threw on the counter. Kim replied that he could go to another store. Todd grabbed the coin, swore at Kim, and left the store slamming the front door on his way out and walked across the street. Kim did not realize Todd had broken the glass door, but discovered the damage shortly afterwards.
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> Kim was busy at the register and did not call the police, but he saw Todd across the street. Approximately 30 minutes later, when the store was less busy, Kim went across the street to confront Todd, leaving employee Braulio Rubio in charge. Kim told Todd that he had broken the window. Todd denied it. As they spoke, Kim noticed that defendant was sitting down and playing guitar on an abandoned couch on

the sidewalk, just behind Todd. Kim insisted that Todd had broken the window. When Kim said he intended to call the police, defendant stood up and punched Kim in the face. Todd punched him several times in the head and face. Kim tried to block the punches, but never fought back. When Kim tried to run away, Todd pushed him to the ground. While Kim was facing the ground, Todd choked him from behind and bit his right ear. Kim felt someone kick him on his side.

Kim managed to escape and received help from a passing motorist, who drove him back to the 7-Eleven. Kim entered the store and called the police. Defendant was across the street on the couch, playing the guitar. Kim had received injuries to his face and pain in his side, along with a severe headache and bruises on his hands and knees.

Alphy Hoffman was at the corner of Yucca and Cahuenga at the time of the incident. When Hoffman first noticed the disturbance, he saw defendant and another male hitting and kicking Kim, who was on the ground. Defendant kicked Kim several times. The incident lasted approximately 10 minutes. Hoffman reported the incident to the 911 operator as it happened. At one point, when a bus pulled up, Hoffman lost sight of defendant. On cross-examination, Hoffman testified that Cahuenga Boulevard was typically busy in terms of traffic at that hour. He viewed the incident from across Cahuenga; his view was slightly obstructed by passing vehicles.

Officer Othar Richey of the Los Angeles Police Department responded to the scene. He saw the abrasions to Kim's face above the left eye, as well as those to his hand and knee. He also saw the broken door or window at the 7-Eleven. Neither Todd nor defendant was injured.

Defense

Rubio was working at the 7-Eleven at the time of the incident. He heard the door slam and saw the glass had been broken. Some five minutes later, Kim went outside to confront the person who broke it. Rubio did not see the altercation. Investigator Dean Deruise interviewed Rubio, who told him that when Rubio wanted to call the 7-Eleven corporate office to report the vandalism, Kim told Rubio to wait and give Kim "a couple of minutes."

Hyun Joe was one of the owners of the 7-Eleven. Kim did not tell him who broke the window, but it had been replaced. Kim did not speak to him about the incident.

Officer Juan Corona testified that defendant and Todd offered no resistance to arrest. They seemed angry, but were not argumentative. Kim told the officer that Todd had broken the store window.

(Respondent's Lodgment 4, pp. 2-4; see People v. Green, 2010 WL 2220062, at *1-2).

PETITIONER'S CONTENTIONS

Petitioner contends:

1. The trial court's asserted failure to obtain a waiver of Petitioner's right to counsel prior to sentencing allegedly violated the Sixth Amendment;

2. The trial court allegedly violated due process by denying Petitioner's request for ancillary funds to hire an eyewitness expert; and

3. The trial court's denial of Petitioner's motion to sever allegedly violated Petitioner's constitutional rights.

STANDARD OF REVIEW

Under the "Antiterrorism and Effective Death Penalty Act of 1996" ("AEDPA"), a federal court may not grant an application for writ of habeas corpus on behalf of a person in state custody with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim: (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); Woodford v. Visciotti, 537 U.S. 19, 24-26 (2002); Early v.

Packer, 537 U.S. 3, 8 (2002); Williams v. Taylor, 529 U.S. 362, 405-09 (2000).

"Clearly established Federal law" refers to the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision. Lockyer v. Andrade, 538 U.S. 63 (2003). A state court's decision is "contrary to" clearly established Federal law if: (1) it applies a rule that contradicts governing Supreme Court law; or (2) it "confronts a set of facts. . . materially indistinguishable" from a decision of the Supreme Court but reaches a different result. See Early v. Packer, 537 U.S. at 8 (citation omitted); Williams v. Taylor, 529 U.S. at 405-06.

Under the "unreasonable application prong" of section 2254(d)(1), a federal court may grant habeas relief "based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced." Lockyer v. Andrade, 538 U.S. at 76 (citation omitted); see also Woodford v. Visciotti, 537 U.S. at 24-26 (state court decision "involves an unreasonable application" of clearly established federal law if it identifies the correct governing Supreme Court law but unreasonably applies the law to the facts). A state court's decision "involves an unreasonable application of [Supreme Court] precedent if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply, or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. at 407 (citation omitted).

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"In order for a federal court to find a state court's application of [Supreme Court] precedent 'unreasonable,' the state court's decision must have been more than incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520 (2003) (citation omitted). "The state court's application must have been 'objectively unreasonable.'" Id. at 520-21 (citation omitted); see also Waddington v. Sarausad, 555 U.S. 179, 129 S. Ct. 823, 831 (2009); Davis v. Woodford, 384 F.3d 628, 637-38 (9th Cir. 2004), cert. dism'd, 545 U.S. 1165 (2005). "Under § 2254(d), a habeas court must determine what arguments or theories supported, . . . or could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." Harrington v. Richter, 131 S. Ct. 770, 786 (2011). This is "the only question that matters under § 2254(d)(1)." Id. (citation and internal quotations omitted). Habeas relief may not issue unless "there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the United States Supreme Court's] precedents." Id. at 786-87 ("As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.").

In applying these standards, the Court looks to the last reasoned state court decision, here the decision of the California Court of Appeal. See DeWeaver v. Runnels, 556 F.3d 995, 997 (9th Cir. 2009), cert. denied, 130 S. Ct. 183 (2009).

Additionally, federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In conducting habeas review, a court may determine the issue of whether the petition satisfies section 2254(a) prior to, or in lieu of, applying the standard of review set forth in section 2254(d). Frantz v. Hazey, 533 F.3d 724, 736-37 (9th Cir. 2008) (en banc).

DISCUSSION

I. Petitioner's Claim that the Trial Court Violated the Sixth Amendment By Allegedly Failing to Obtain a Waiver of Petitioner's Right to Counsel at Sentencing Does Not Merit Habeas Relief.

A. Background

Petitioner initially was represented by a deputy public defender (see R.T. A-1; C.T. 48). On July 1, 2008, the court heard and denied Petitioner's motion to substitute counsel (R.T. A-1 - A-2; R.T. 49). Subsequently, Petitioner's counsel advised the court that Petitioner wished to represent himself (R.T. A-15). The court said it would give Petitioner a form to fill out,[3] adding: "[t]he only thing I'll tell you in advance is I have seen almost nobody who's pro per, with [sic] exception of one or two exceptional people, do justice to themselves" (R.T. A-15). The court told Petitioner:

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[3] The record does not contain this form.

> I've had a couple of defendants I just sent out for trial who are pro per. And they're making an absolute mess of their cases. They're bright guys, but they don't know the law, and they don't know what they're doing.
>
> We'll give you the form. We'll bring you back tomorrow. Think about what I'm saying because, no matter how bright you are, if you don't know the procedures, you can really mess things up.

(R.T. A-15 - A-16). Petitioner said he understood (R.T. A-16).

On July 2, 2008, the court granted Petitioner's request to represent himself (R.T. B-8; C.T. 51). Prior to granting the request, the court ascertained from Petitioner that Petitioner had filled out and signed a waiver form, and that Petitioner had read and understood the form (R.T. B-2). The court advised Petitioner that he had the right to counsel, including the right to have an attorney appointed for him if he could not afford an attorney (R.T. B-2). Petitioner confirmed that he understood and that he wanted to give up his right to an attorney (R.T. B-2). Petitioner confirmed that he understood the charges and the possible penalties (R.T. B-7). Petitioner said he had attended UCLA and needed only two more classes to obtain a B.A. (R.T. B-4). Petitioner confirmed that he understood his rights to a speedy trial, to a jury trial, to cross-examine and confront witnesses, to remain silent, and to bail (R.T. B-2 - B-3). The court

told Petitioner that, if Petitioner represented himself, Petitioner would have to follow "all the technical and substantive rules of law," and that Petitioner would not receive "any leeway" because he was representing himself (R.T. B-4). The court advised Petitioner that, by representing himself, Petitioner would be taking the chance that he would not be able to litigate a claim properly, and that Petitioner could not challenge on appeal his own ineffectiveness (R.T. B-4). The court advised Petitioner that he would be held to the same standards as an attorney at trial in doing things such as making motions, selecting a jury, giving opening and closing statements, conducting cross-examination, preparing and presenting jury instructions, making post-verdict motions, and presenting arguments at sentencing, and would not receive any help (R.T. B-5 - B-6). The court said Petitioner had to "do it competently, or . . . suffer the consequences" (R.T. B-6). The court told Petitioner that his custodial status would impede Petitioner, and that his movement in the courtroom would be limited in front of the jury (R.T. B-6 - B-7). Finally, the court reminded Petitioner of the adage that a man who represents himself has a fool for a client, and advised Petitioner that it was a "very serious mistake" to represent himself (R.T. B-7 - B-8). Petitioner confirmed that he understood, and that he nevertheless wanted to represent himself (R.T. B-8). The court granted Petitioner pro per status and relieved the deputy public defender (R.T. B-8; C.T. 51-52).

Thereafter, Petitioner represented himself at trial and filed a number of pro per motions, including a motion to compel discovery, a motion to set aside the Information pursuant to California Penal Code

section 995, and a motion for funds to secure an expert witness (C.T. 57-61, 63-73, 81-86).

On August 22, 2008, after the jury rendered its verdict, Petitioner asked whether he could maintain his pro per status (R.T. 272). The court said: "Of course. You've got it until you give it up." (R.T. 272). Petitioner agreed to a continuance to September 5, 2008 for the trial of the prior conviction allegations and sentencing (R.T. 272). The following occurred:

> [Petitioner]: . . . Actually, can I give up my pro per status right now and be assigned counsel for appeal or counsel for sentencing and then when I intend to file an appeal?
>
> The Court: Did you have the public defender before?
>
> [Petitioner]: Yes . . .
>
> The Court: You can do it with one understanding, which is I don't want you going back and forth. You're done.
>
> [Petitioner]: Yes.
>
> The Court: Okay. Yes, you can give up your pro per status. The public defender is reappointed on this case.

(R.T. 272-73). The court asked the prosecutor to contact the public

defender's office and set the next proceeding for August 27, 2008 (R.T. 273). The minute order for August 22, 2008 states, inter alia: "The defendant gives up his right to pro per status. The matter is continued to August 27, 2008 at 8:30 a.m. in this department for appointment of the public defender's office" (C.T. 105). However, on August 27, 2008, no one appeared from the public defender's office, and the court continued the matter to September 3, 2008 (C.T. 150).

On September 3, 2008, Petitioner appeared, represented by his former public defender (R.T. 277). The court asked Petitioner if he wanted to represent himself again (R.T. 277). Petitioner said: "Yes, sir. I didn't understand that anything was finalized as far as giving up my status, and I would like to continue in pro per" (R.T. 277). Petitioner said he had several motions he wanted to file (R.T. 278). The following occurred:

> The Court: Wait. Wait. Wait. One second. Okay. You did give up your pro per status. The public defender was appointed; and, [Petitioner's counsel], the public defender's office hasn't done anything yet to prepare for this; is that correct?
>
> [Petitioner's counsel]: No. We requested our closed file which we have not received yet. And we have not prepared otherwise.
>
> The Court: Okay. All right. Public defender's office is again relieved, and I'll let you represent yourself for

the rest of the case, Mr. Green.

(R.T. 278). Immediately thereafter, Petitioner filed the following pro per motions: (1) a motion for a continuance, bearing a signature date of August 25, 2008; (2) a motion for ancillary services and funds, bearing a signature date of August 27, 2008; (3) a motion for transcripts, bearing a signature date of August 27, 2008; and (4) a motion to dismiss on speedy trial grounds, bearing a signature date of September 1, 2008 (R.T. 278-79; C.T. 153-71).[4] Petitioner represented himself for the remainder of the proceedings, including sentencing.

Petitioner contends the trial court erred by failing to obtain another waiver of Petitioner's right to counsel at sentencing, as purportedly required by Faretta v. California, 422 U.S. 806 (1975) ("Faretta") (Pet. Supp., pp. 34-39). The Court of Appeal rejected this contention, ruling that no California or federal law supported Petitioner's claim (Respondent's Lodgment 4, pp. 10-14; see People v. Green, 2010 WL 2220062, at *7-8). The Court of Appeal indicated that readvisement was "particularly unnecessary" in Petitioner's case, because Petitioner's request for reassignment of counsel was "obviously made with full knowledge of his constitutional right to counsel" (Respondent's Lodgment 4, p. 13; see People v. Green, 2010 WL 2220062, at *8). The Court of Appeal also stated that Petitioner had failed to show how the trial court's failure to give a second set of Faretta advisements prejudiced Petitioner (Respondent's Lodgment 4,

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[4] The signature dates of these motions indicate that Petitioner prepared and signed them prior to the September 3, 2008 court proceeding.

pp. 13-14; see People v. Green, 2010 WL 2220062, at *8).

B. Discussion

A criminal defendant is constitutionally entitled to waive his or her Sixth Amendment right to counsel and to represent himself or herself at trial, as long as the defendant's waiver of counsel is knowing and intelligent. Faretta, 422 U.S. at 820-21, 835. "A waiver of counsel will be considered knowing and intelligent only if the defendant is made aware of (1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation . . . ." United States v. Farhad, 190 F.3d 1097, 1099 (9th Cir. 1999), cert. denied, 529 U.S. 1023 (2000); see also Faretta, 422 U.S. at 835 (a defendant wishing to proceed in propria persona "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open") (citation and quotations omitted).

However, "[n]either the Constitution nor Faretta compels the [court] to engage in a specific colloquy with the defendant." Lopez v. Thompson, 202 F.3d 1110, 1117-19 (9th Cir.), cert. denied, 531 U.S. 883 (2000) (Faretta "mandated no specific litany or formula to ensure that waivers of counsel are knowing and intelligent"). The court may examine the record as a whole to determine if the trial court made the defendant aware of the dangers and disadvantages of self-representation. Id. at 1117; see also Edwards v. Arizona, 451 U.S. 477, 482 (1981) (determination that a waiver was knowingly and

intelligently made "depends in each case upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused"; citations and quotations omitted); McCormick v. Adams, 621 F.3d 970, 979 (9th Cir. 2010) ("a defective waiver colloquy will not necessitate automatic reversal when the record as a whole reveals a knowing and intelligent waiver") (citation and internal quotations omitted). "In assessing waiver of counsel, the trial judge is required to focus on the defendant's understanding of the importance of counsel, not the defendant's understanding of the substantive law or the procedural details." Lopez v. Thompson, 202 F.3d at 1119. The court must "focus on what the defendant understood, rather than on what the court said or understood." McCormick v. Adams, 621 F.3d at 976 (citation and internal quotations omitted).

Petitioner does not dispute that the trial court's initial advisements were adequate, and that Petitioner's initial waiver of counsel was knowing and intelligent. Rather, Petitioner argues that the trial court was required to provide Faretta readvisements at the time Petitioner reasserted his Faretta right on September 3, 2008 (Pet. Supp., pp. 34-39). Petitioner relies on dicta in Arnold v. United States, 414 F.2d 1056, 1059 (9th Cir. 1969), cert. denied, 396 U.S. 1021 (1970).[5]

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[5] To the extent Petitioner contends the trial court's failure to give Faretta readvisements violated state law, Petitioner is not entitled to habeas relief. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); 28 U.S.C. § 2254(a).

The Arnold decision does not aid Petitioner. In that case, the Ninth Circuit rejected the defendant's argument that his knowing and voluntary waiver of counsel at trial did not extend to sentencing proceedings. Arnold v. United States, 414 F.2d at 1059. The court held that, "[w]hile it is true that the Sixth Amendment right to counsel applies at all critical stages of the prosecution, including the sentencing stage, it does not follow that once the assistance of counsel in court has been competently waived, a new waiver must be obtained at every subsequent court appearance by the defendant." Id. The Arnold Court stated that a Faretta waiver is effective for all further proceedings in the case "unless appointment of counsel for subsequent proceedings is expressly requested by the defendant or there are circumstances which suggest that the waiver was limited to a particular stage of the proceedings." Id. Nothing in the record shows that Petitioner's initial waiver of counsel was limited to trial and did not extend to post-verdict proceedings and sentencing. Although Petitioner asked the court whether he could give up his pro per status, Petitioner arguably never made any express request for the reappointment of counsel. Rather, the trial court answered Petitioner's question and then apparently inferred a request by Petitioner to "give up . . . pro per status." In any event, the cited dicta in the Arnold decision does not represent "clearly established Federal law, as determined by the Supreme Court of the United States," within the meaning of 28 U.S.C. section 2254(d).

"A properly conducted Faretta colloquy need not be renewed in subsequent proceedings unless intervening events substantially change the circumstances existing at the time of the initial colloquy."

United States v. Hantzis, 625 F.3d 575, 580-81 (9th Cir. 2010), cert. denied, 131 S. Ct. 2133 (2011). "The essential inquiry is whether circumstances have sufficiently changed since the date of the Faretta inquiry that the defendant can no longer be considered to have knowingly and intelligently waived the right to counsel." Id. at 581; see also McCormick v. Adams, 621 F.3d at 979. "[T]he Sixth Amendment does not require a new colloquy to inform the defendant of the risks and difficulties of *pro se* representation where it is discernable in the record that the defendant was made well aware of those risks and difficulties." United States v. Bisong, 645 F.3d 384, 2011 WL 1900736, at *10 (D.C. Cir. May 20, 2011).

Here, the intervening circumstance between the original waiver of counsel on July 2, 2008 and the renewed waiver on September 3, 2008 consisted of Petitioner's temporary relinquishment of his Faretta right on August 22, 2008. Nothing in the record shows that Petitioner's temporary relinquishment of his Faretta right from August 22, 2008 to September 3, 2008 vitiated his understanding of the charge (of which, by September 3, 2008, he had been convicted), the possible penalty, or the dangers and disadvantages of self-representation. Furthermore, the record reflects that Petitioner did not perceive the temporary relinquishment of his Faretta right as a significant event. To the contrary, Petitioner stated at the September 3, 2008 proceeding that he had not understand that his relinquishment of his pro per status had been "finalized" (R.T. 277). Petitioner authored and signed four pro per motions during the period of his temporary relinquishment of his pro per status. In such circumstances, Petitioner has failed to show that his renewed waiver

of counsel on September 3, 2008 was not knowing and intelligent. See United States v. Bisong, 2011 WL 1900736, at *8-10 (rejecting argument that waiver of counsel was not knowing and intelligent, where several months passed after the Faretta colloquy before the court granted the Faretta request, during which period Petitioner was represented by counsel); United States v. Modena, 302 F.3d 626, 630-31 (6th Cir. 2002), cert. denied, 537 U.S. 1145 (2003) (where defendant initially elected to waive counsel following Faretta advisements, later requested counsel, but thereafter withdrew his request for counsel, defendant's "interim change of heart" regarding his initial decision to proceed pro se did not necessitate a new waiver-of-counsel hearing).

In his Traverse, Petitioner quotes a dissenting opinion in a capital case, Grandison v. Maryland, 479 U.S. 873, 875 (1986), for the propositions that a sentencing hearing assertedly is "like a separate trial" and that a waiver of counsel at the guilt phase of a trial assertedly has no bearing on the right to counsel at the sentencing phase (Traverse, p. 6). Petitioner alleges: "Where the sentencing court promised him a lawyer for the sentencing phase of the case: it was a violation of Petitioner's Sixth Amendment right" (Traverse, p. 6).

The record belies any claim that the court "promised" Petitioner an attorney for sentencing proceedings. The record contains no such promise and clearly shows that Petitioner expressly chose to represent

himself at sentencing.[6]

In any event, any such claim is foreclosed by the holding of John-Charles v. California, ___ F.3d ___, 2011 WL 2937945, at *5-6 (9th Cir. July 22, 2011). In that case, the trial court granted the petitioner's request to represent himself. Id. at *1. The petitioner later sought reappointment of counsel three times: on the day set for trial, the day that the prosecution filed an amended information alleging a "strike" under California's Three Strikes Law, and the day following the commencement of jury selection. Id. at *1-2. The court denied all three requests. Id. at *1-2. The Ninth Circuit held the petitioner was not entitled to habeas relief, reasoning that: (1) no Supreme Court case provided any "tailored guidance" concerning the issue; (2) a "fairminded jurist" could agree that Faretta and Gideon v. Wainwright, 372 U.S. 335 (1963), did not require reappointment of counsel after an initial waiver of the right; and (3) the conclusion that the Sixth Amendment right to counsel is not absolute once it has been waived was consistent with the decisions of four other circuits. Id. at *5-6 (citations omitted).[7]

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[6] Although any such claim appears to be unexhausted, the Court may deny on the merits an unexhausted claim which is not "colorable." See Cassett v. Stewart, 406 F.3d 614, 623-24 (9th Cir. 2005), cert. denied, 546 U.S. 1172 (2006); 28 U.S.C. § 2254(b)(2). For the reasons discussed herein, any such claim is not "colorable."

[7] Petitioner's reliance on a dissenting opinion in a Supreme Court case is plainly unavailing. See United States v. Ameline, 409 F.3d 1073, 1083 n.5 (9th Cir. 2005) (en banc) (Supreme Court dissenting opinions "of course[] are not precedential").

For the foregoing reasons, the Court of Appeal's rejection of Petitioner's Faretta claim was not contrary to, or an objectively unreasonable application of, any clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 131 S. Ct. at 785-87. Petitioner is not entitled to habeas relief on this claim.

II. The Trial Court's Denial of Petitioner's Request for Ancillary Funds to Hire an Eyewitness Expert Does Not Merit Habeas Relief.

A. Background

Prior to trial, Petitioner filed a motion for ancillary funds to secure the services of an "eyewitness expert/crime scene analist [sic]" (C.T. 81-86). Petitioner allegedly desired the services of such an expert to attack Hoffman's ability to perceive the incident (C.T. 82). At the hearing on the motion, the court asked Petitioner: "Is this a case where you're claiming it's not you, that they got the wrong guy?" (R.T. F-1). Petitioner said: "No, sir" (R.T. F-1). Petitioner said that he wanted the expert "to question the witness' ability to perceive from his location" and to examine whether the witness's testimony might have been based on the witness' alleged "expectation[]" of seeing a fight (R.T. F-2). The court asked Petitioner what the expert would say (R.T. F-2). Petitioner responded: "Okay. I believe it's a matter of common knowledge that witnesses are often fallible in giving testimony" (R.T. F-2). The court responded that experts did not testify about the things Petitioner had described, but rather testified concerning eyewitness

identification mistakes (R.T. F-2). Petitioner said that, because he and Todd had been dressed alike, Hoffman could have had a problem identifying "who did what" (R.T. F-2 - F-3). The court said: "There's not an issue one of those two people is you?" (R.T. F-3). Petitioner said: "No" (R.T. F-3). The court denied the motion (R.T. F-3; C.T. 87).

The Court of Appeal upheld the trial court's decision (Respondent's Lodgment 4, pp. 4-7; see People v. Green, 2010 WL 2220062, at *3-4). The Court of Appeal stated that, under Ake v. Oklahoma, 470 U.S. 68 (1985) ("Ake"), the Constitution does not require a state to provide an indigent defendant with "'all the assistance that his wealthier counterpart might buy.'" (Respondent's Lodgment 4, p. 6; see People v. Green, 2010 WL 2220062, at *3 (quoting Ake, 470 U.S. at 77). The Court of Appeal ruled that Petitioner had not "offered any credible basis to think an eyewitness expert would have brought any helpful specialized insight to bear on the question of Hoffman's ability to place [Petitioner] at the scene as one of the two assailants" (Respondent's Lodgment 4, p. 6; see People v. Green, 2010 WL 2220062, at *4). Noting that Petitioner did not assert a mistaken identity defense, the Court of Appeal observed that Hoffman's testimony established that Hoffman did not see how the confrontation began, had viewed the altercation from across a busy, multi-lane street, and had admitted his view was partially impaired by traffic and completely blocked by a bus at one time (Respondent's Lodgment 4, p. 6; see People v. Green, 2010 WL 2220062, at *4). The Court of Appeal concluded that Petitioner had not shown that the proposed expert testimony would have made a difference at trial, because

Petitioner had not shown what exculpatory inferences could have been drawn had the expert testified (Respondent's Lodgment 4, p. 7; see People v. Green, 2010 WL 2220062, at *4).

B. Discussion

In limited circumstances, the exclusion of crucial evidence may violate the Constitution. See Holmes v. South Carolina, 547 U.S. 319, 319 (2006) ("[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense") (citations and internal quotations omitted); Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Chambers"); Chia v. Cambra, 360 F.3d 997, 1003 (9th Cir. 2004), cert. denied, 544 U.S. 919 (2005) ("The Supreme Court has made it clear that the erroneous exclusion of critical, corroborative defense evidence may violate both the Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense.") (citations and internal quotations omitted).

However, "Chambers . . . does not stand for the proposition that the defendant is denied a fair opportunity to defend himself whenever a state . . . rule excludes favorable evidence." United States v. Scheffer, 523 U.S. 303, 316 (1998). "While the Constitution . . . prohibits the exclusion of defense evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that they are asserted to promote, well-established rules of evidence permit

trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." Holmes v. South Carolina, 547 U.S. at 320 (citations omitted); see also Moses v. Payne, 555 F.3d 742, 758 (9th Cir. 2009). Thus, "the Constitution permits judges to exclude evidence that is repetitive . . . , only marginally relevant or poses an undue risk of harassment, prejudice or confusion of the issues." Holmes v. South Carolina, 547 U.S. at 326-27 (citations, internal brackets and quotations omitted).

In California, a trial court "has broad discretion in determining whether to admit or exclude expert testimony . . . ." People v. Manning, 165 Cal. App. 4th 870, 81 Cal. Rptr. 3d 452 (2008) (citation omitted); see also People v. Richardson, 43 Cal. 4th 959, 1008, 77 Cal. Rptr. 3d 163, 183 P.3d 1146 (2008), cert. denied, 129 S. Ct. 1316 (2009) (court may exclude expert testimony where its probative value is outweighed substantially by the risk of undue delay, prejudice or confusion). The United States Supreme Court has not squarely addressed the issue of whether or when an evidentiary rule that requires a trial court to "balance factors and exercise its discretion" might violate a defendant's due process right to present a defense. See Moses v. Payne, 555 F.3d at 758; see also Brown v. Horell, 644 F.3d 969 (9th Cir. 2011). Rather, the Supreme Court cases have "focused only on whether an evidentiary rule, by its own terms, violated a defendant's right to present evidence[,]" not whether a court's exercise of discretion in excluding evidence violates that right. Moses v. Payne, 555 F.3d at 758. Petitioner does not contend, and the record does not show, that the trial court applied any state

evidentiary rule which "by its own terms" required exclusion. Thus, federal habeas relief is unavailable because no clearly established Supreme Court law supports Petitioner's claim. See id.; Brown v. Horell, 644 F.3d 969 (9th Cir. 2011) ("[b]etween the issuance of Moses and the present, the Supreme Court has not decided any case either 'squarely addressing' the discretionary exclusion of evidence and the right to present a complete defense or 'establishing a controlling legal standard' for evaluating such exclusions"; discretionary exclusion of expert testimony concerning interrogation methods did not warrant habeas relief) (brackets omitted); see also 28 U.S.C. § 2254(d); Knowles v. Mirzayance, 556 U.S. 111, 129 S. Ct. 1411, 1419 (2009) ("it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court") (citations omitted); Wright v. Van Patten, 552 U.S. 120, 126 (2008) ("Because our cases give no clear answer to the question presented, . . . it cannot be said that the state court unreasonably applied clearly established Federal law") (citation, internal brackets and quotations omitted).

Additionally, although a California court has discretion to appoint an eyewitness expert to assist an indigent defendant, see People v. McDonald, 37 Cal. 3d 351, 377, 208 Cal. Rptr. 236, 690 P.2d 709 (1984), overruled on other grounds, People v. Mendoza, 23 Cal. 4th 896, 914, 98 Cal. Rptr. 2d 431, 446, 4 P.3d 265 (2000), nothing in the Constitution mandates such an appointment. Although the Constitution may require the appointment of a psychiatric expert at state expense in a capital case where the defendant's sanity is likely to be an issue, see Ake v. Oklahoma, 470 U.S. 68, 74 (1985) ("Ake"), the

Supreme Court has declined to address the extent to which, if at all, the Constitution requires the appointment of a non-psychiatric expert. See Caldwell v. Mississippi, 472 U.S. 320, 323-24 n.1 (1985) ("Caldwell") (declining "to determine as a matter of federal constitutional law what if any showing would have entitled [the petitioner]" to the appointment of fingerprint and ballistics experts, where the petitioner "offered little more than undeveloped assertions that the required assistance would be beneficial"). Hence, no "clearly established" Supreme Court law requires the appointment of an eyewitness expert or crime scene analyst. See Jackson v. Ylst, 921 F.2d 882, 885-87 (9th Cir. 1990) (to hold unconstitutional a trial court's denial of application for appointment of eyewitness expert would constitute a "new rule," the retroactive application of which would be barred by Teague v. Lane, 489 U.S. 288 (1989); California law created no liberty interest in appointment of such an expert); see also Weeks v. Angelone, 176 F.3d 249, 264-66 & n.9 (4th Cir. 1999), aff'd on other grounds, 528 U.S. 225 (2000) (Ake and Caldwell do not establish a criminal defendant's constitutional right to assistance of non-psychiatric experts such as pathology and ballistics experts; because defendant's claim was barred by Teague v. Lane, it "necessarily follows" that claim also was barred by 28 U.S.C. section 2254(d)); Sanchez v. Hedgpeth, 706 F. Supp. 2d 963, 988-89 (C.D. Cal. 2010) ("the Supreme Court has declined to consider whether the Ake holding extends beyond psychiatrists to other expert witnesses and investigators"; citing Caldwell; denying habeas relief because "the Supreme Court has not clearly established a constitutional right to the appointment of forensic experts"); Griffin v. Howes, 2009 WL 211172 (E.D. Mich. Jan. 27, 2009) ("In light of the language of Ake

and the Supreme Court's reservation in Caldwell, there is disagreement [in the Courts of Appeal] over whether Ake requires the provision of expert services beyond psychiatric services necessary to present an insanity defense"; asserted right to non-psychiatric expert not "clearly established" within the meaning of 28 U.S.C. section 2254(d)(1) (citations omitted)). Therefore, Petitioner is not entitled to habeas relief on this claim. See Moses v. Payne, 555 F.3d 742, 758-59 (9th Cir. 2009) (habeas relief unavailable where the Supreme Court had articulated no "controlling legal standard" on the issue); Larson v. Palmateer, 515 F.3d 1057, 1066 (9th Cir.), cert. denied, 129 S. Ct. 171 (2008) (where Supreme Court "expressly left [the] issue an 'open question,'" habeas relief unavailable).

In any event, the failure to appoint an eyewitness expert/crime scene analyst did not deny Petitioner a fair trial. Because Petitioner conceded to the court that he was present at the incident (see R.T. F-3), and did not advance a defense of mistaken identity, there was no need for expert testimony on eyewitness identification. See Holmes v. South Carolina, 547 U.S. at 326-27 (court may exclude evidence that is "only marginally relevant or poses an undue risk of harassment, prejudice or confusion of the issues.") (citations, internal brackets and quotations omitted). Furthermore, eyewitness identification expert testimony "is strongly disfavored by most courts." United States v. Labansat, 94 F.3d 527, 530 (9th Cir. 1996), cert. denied, 519 U.S. 1140 (1997) (citation and internal quotations omitted). "Any weaknesses in eyewitness identification testimony can ordinarily be revealed by counsel's careful cross-examination of the eyewitness." Id. (citation and internal quotations omitted); see also

Howard v. Clark, 608 F.3d 563, 574 (9th Cir. 2010) ("we adhere to the position that skillful cross examination of eyewitnesses, coupled with appeals to the experience and common sense of jurors, will sufficiently alert jurors to specific conditions that render a particular eyewitness identification unreliable") (citations and internal quotations omitted).

Petitioner appears to have desired to call an expert to testify concerning the allegedly impaired view of the incident that a person in Hoffman's position purportedly would have had. On cross-examination, however, Petitioner elicited Hoffman's testimony that: (1) Hoffman assertedly had not seen the start of the fight; (2) when Hoffman first observed the incident, Hoffman allegedly immediately assumed it was a fight; and (3) Hoffman's view of the incident reportedly was "slightly" obscured by vehicles, including a bus (R.T. 134, 137). In these circumstances, Petitioner has not shown that this cross-examination "was any less effective without the services of the expert." See United States v. Brewer, 783 F.2d 841, 843 (9th Cir.), cert. denied, 479 U.S. 831 (1986) (citation and internal quotations omitted). Petitioner argued in closing that it was "common knowledge" that "people sometimes don't see what they expect to see, and Mr. Hoffman did say he thought it was a fight on first glance" (R.T. 245). Therefore, the trial court's refusal to provide ancillary funds for an eyewitness expert or crime scene analyst did not render Petitioner's trial unfair or deny Petitioner the right to present a defense. See Holmes v. South Carolina, 547 U.S. at 326-27; Brown v. Terhune, 158 F. Supp. 2d 1050, 1071 (N.D. Cal. 2001), aff'd, 59 Fed. App'x 190 (9th Cir. 2003) (counsel not ineffective in failing to call

eyewitness identification expert, where counsel cross-examined witnesses concerning identifications and emphasized alleged problems with identifications in closing).

For the foregoing reasons, Petitioner is not entitled to habeas relief on his claim that the trial court erred in denying Petitioner funds to secure the services of an expert.

III. The Denial of Petitioner's Motion to Sever Does Not Merit Habeas Relief.

A. Background

Prior to trial, Petitioner's counsel moved to sever Petitioner's trial from that of Todd (R.T. A-11). At the July 1, 2008 hearing on the motion, Petitioner's counsel argued that Todd could provide allegedly exculpatory testimony for Petitioner (R.T. A-11 - A-12). Counsel claimed that Todd had told Petitioner that Petitioner had nothing to do with the incident, and that Todd would like to testify for Petitioner (R.T. A-12, A-15). The court said: "If Mr. Todd is going to testify in Mr. Green's behalf, he can do that in a joint trial. If he's going to assert his Fifth Amendment right not to testify, then there's no ground for severance." (R.T. A-13). Petitioner's counsel stated that Todd would not testify in a joint trial, and had indicated a willingness to accept a plea offer (R.T. A-13). The court said: "If he pleads out, I don't need to sever anyway" (R.T. A-13). The court denied the motion (R.T. A-14).

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On August 11, 2008 (after the court had granted Petitioner's request for self-representation), Todd's attorney declared a conflict (R.T. E-8). Another attorney from the bar panel appeared on Todd's behalf, but indicated that he was "just standing in on behalf of the bar panel" and was "not going to keep the case for [himself]" (R.T. E-8). This attorney mentioned that the prosecutor had offered a "package deal" to the defendants, whereby Todd would receive time served and probation in exchange for a plea (R.T. E-12). The prosecutor confirmed the offer was part of a package deal (R.T. E-13). When the court mentioned an open plea,[8] the prosecutor requested that the court not take an open plea, saying that, because Petitioner and Todd had committed the crimes together, "it [made] sense to try them as a unit rather than split them up" (R.T. E-13 - E-14). The court indicated that if Todd sought an open plea, the court probably would take the plea but delay sentence until Petitioner's trial concluded (R.T. E-14). The court indicated that, if Todd testified and the court felt the testimony was untruthful, Todd "would be in a much different position than if he -- if he gave truthful testimony. . . ." (R.T. E-14). The court said:

> Whether he wants to testify or not is up to him, and I wouldn't suggest he shouldn't if that's what he chose to do. But I wouldn't sentence him before he testifies. Then that decision is up to

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[8] "An open plea is a plea unconditioned upon receipt of a particular sentence or other exercise of the court's powers." People v. Conerly, 176 Cal. App. 4th 240, 245 n.1, 98 Cal. Rptr. 3d 76 (2009) (citations and internal quotations omitted).

him.

(R.T. E-14). The court reiterated that it would sentence Todd "when the trial is over" (R.T. E-15). The bar panel attorney said that he, the attorney, would advise Todd not to testify at Petitioner's trial if Todd had pled but had not yet been sentenced (R.T. E-15). The court responded: "That's up to him. Whether his 5th Amendment right still applies or not, he could still choose to testify if he wanted to" (R.T. E-15).

Todd entered a plea on August 15, 2008 (see R.T. 391, 474). On August 18, 2008, the prosecutor requested a hearing to determine whether Todd was going to testify (R.T. 12). The court said that, because Todd had not yet been sentenced, Todd still could assert his privilege against self-incrimination if he chose to do so (R.T. 13).

On August 19, 2008, the court held a hearing at which Todd appeared, represented by counsel (R.T. 30). Petitioner told the court he wanted to call Todd as a witness (R.T. 30). The court told Todd that, because Todd had not yet been sentenced, Todd could not be forced to testify (R.T. 30-31). Todd's counsel reported that he had advised Todd not to testify because it could affect Todd's pending case, but confirmed that the decision was Todd's to make (R.T. 31). The court reminded Todd that Todd's sentence could be affected if the court determined that Todd lied in his testimony (R.T. 31). The prosecutor said the prosecution had not given Todd any immunity (R.T. 33).

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Todd told the court that he did not "have an exact memory" of everything that had happened (R.T. 33). Todd said: "So, you know, memory-wise, I can't be accurate on that because I was in a mutual combat with this other man, Mr. Kim. So anything that happened in that time -- I'm not really aware of what happened with him [Petitioner] or aware of his whereabouts. I was involved with Mr. Kim." (R.T. 33-34). Todd said: "If I wasn't aware of his [Petitioner's] whereabouts during this activity that happened, then how can I really be questioned?" (R.T. 34). The court again asked Todd what Todd wanted to do (R.T. 35). Todd said: "Well, I can't testify for something I have no whereabouts of. This is testimony based on Mr. Green's activity in this, and I have no memory of him in that during that time when Mr. Kim approached or after he left." (R.T. 35). Asked again if Todd wanted to testify, Todd responded: "No, I don't really. I really don't." (R.T. 35). Todd was then sworn and asserted his Fifth Amendment privilege not to testify (R.T. 36-37).

Later that day, out of the presence of jurors, Petitioner told the court that he had talked to Todd in the "tank" and that Todd allegedly said he was willing to testify (R.T. 44). The court asked Petitioner what Todd would say if Todd testified (R.T. 44). Petitioner said Todd would testify that Petitioner's involvement was "minimal at the very end of it" (R.T. 45). Petitioner said he expected Todd would say that Petitioner "acted to break up the confrontation," and Petitioner argued that this purported testimony would support Petitioner's defense of defense of another (R.T. 46-47). The court told Petitioner that Petitioner could not mention Todd's

proposed testimony in opening statement (R.T. 47-48).

On August 20, 2008, the prosecution rested (R.T. 148). The next day, August 21, 2008, Todd and his counsel appeared at a conference out of the presence of the jury (R.T. 152). Todd again told the court he would not testify (R.T. 153).

At a post-verdict hearing on Petitioner's speedy trial motion, Petitioner attempted to elicit evidence concerning the motion to sever (R.T. 340). The court told Petitioner that the speedy trial motion had nothing to do with the motion to sever (R.T. 340). In connection with the speedy trial motion, Petitioner testified that Todd had told Petitioner that Todd would testify, and Todd testified that he told Petitioner that he would testify after he signed the plea "deal" (R.T. 392, 589-90). Petitioner also elicited the testimony of inmate witnesses that Todd reportedly had expressed a willingness to testify at Petitioner's trial (R.T. 369, 416).

Following the verdict, the court denied Petitioner's motion for a new trial challenging, inter alia, the denial of the motion to sever (R.T. 643-50; C.T. 334-35). The court stated that the case "never was appropriate for a severance" and that in any event there had been no joint trial with Todd (R.T. 647).

The Court of Appeal rejected Petitioner's challenge to the trial court's denial of the motion to sever (Respondent's Lodgment 4, pp. 7-10; see People v. Green, 2010 WL 2220062, at *4-5). The Court of Appeal denied Petitioner's constitutional challenge to the trial

court's decision on the ground that Petitioner asserted that claim "in perfunctory faction [sic] without adequate supporting authority" (Respondent's Lodgment 4, p. 7; see People v. Green, 2010 WL 2220062, at *4) (citations omitted). The Court of Appeal also ruled that, in any event, Petitioner had not shown why severance was required or how the denial of his severance motion prejudiced Petitioner (Respondent's Lodgment 4, pp. 7-10; see People v. Green, 2010 WL 2220062, at *4-5). The Court of Appeal deemed it "a matter of pure speculation whether Todd would have testified if the trial had been ordered severed" (Respondent's Lodgment 4, p. 10; see People v. Green, 2010 WL 2220062, at *6). The Court of Appeal also said that, by pleading guilty, Todd "effectively gave [Petitioner] a separate trial," although Todd refused to testify at that trial (Respondent's Lodgment 4, p. 10; see People v. Green, 2010 WL 2220062, at *6). The Court of Appeal also concluded that, given Todd's statement that he did not recall what Petitioner was doing during the incident, there was no reason to think Todd's testimony would have aided Petitioner (Respondent's Lodgment 4, p. 10; see People v. Green, 2010 WL 2220062, at *6).

B. Discussion

Federal habeas corpus relief may be granted "only on the ground that [Petitioner] is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The improper joinder of defendants does not violate the Constitution unless "it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." United States v. Lane, 474 U.S. 438, 446 n.8 (1986). When reviewing a trial court's denial of a

motion to sever, "[t]he question presented in a state prisoner's petition for writ of habeas corpus is whether the state proceedings satisfied due process. To prevail, [petitioner] bears the burden of demonstrating that the state court's denial of his severance motion rendered his trial fundamentally unfair." Grisby v. Blodgett, 130 F.3d 365, 370 (9th Cir. 1997) (internal citations and quotation marks omitted); see also Davis v. Woodford, 384 F.3d 628, 638-39 (9th Cir. 2004), cert. denied, 545 U.S. 1165 (2005) (discussing same). Fundamental unfairness is shown if the "impermissible joinder had a substantial and injurious effect or influence in determining the jury's verdict." Sandoval v. Calderon, 241 F.3d 765, 772 (9th Cir. 2000), cert. denied, 534 U.S. 847, 943 (2001).[9]

"[I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." Zafiro v. United States, 506 U.S. 534, 540 (1993). However, "[a] defendant might suffer prejudice if essential exculpatory evidence that would be available to a defendant tried alone were unavailable in a joint trial." Id. at 539 (citation omitted). "When the reason for severance is the need for a codefendant's testimony, the threshold showing required of the defendant is (1) that he would call the defendant at a severed trial,

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[9] To the extent Petitioner contends the court's refusal to sever violated state law, Petitioner is not entitled to habeas relief. See Estelle v. McGuire, 502 U.S. at 67-68; 28 U.S.C. § 2254(a). In addressing a challenge to a refusal to sever, a federal habeas court should neither "depend on the state law governing severance in state trials" nor "consider procedural rights to severance afforded in federal trials." Grisby v. Blodgett, 130 F.3d at 370.

(2) that the codefendant would in fact testify, and (3) that the testimony would be favorable to the moving party." United States v. Reese, 2 F.3d 870, 892 (9th Cir. 1993), cert. denied, 510 U.S. 1094 (1994); see also United States v. Mariscal, 939 F.2d 884, 885 (9th Cir. 1991). Petitioner must show that Todd's purported proposed testimony was "substantially exculpatory." United States v. Mariscal, 939 F.2d at 885 (citations omitted); see also United States v. Pitner, 307 F.3d 1178, 1181 (9th Cir. 2002).

Petitioner's claim fails for several reasons. By the time Petitioner wished to call Todd to testify, Todd had pled guilty, and hence, as the Court of Appeal reasonably concluded, the trials effectively were severed. Petitioner's inability to secure Todd's testimony was caused not by any failure to sever, but by the court's decision to delay Todd's sentencing coupled with Todd's unwillingness to testify while his sentencing was pending, a situation that would have existed even if the court had severed the cases.[10] Regardless of severance, Petitioner had no right to require Todd to be sentenced before Petitioner called Todd as a witness in Petitioner's case. See Mack v. Peters, 80 F.3d 230, 235 (7th Cir. 1996) ("Severance of co-defendants does not create a right to a particular trial sequence. . . . [¶] Nor does a conditional offer to testify by a co-defendant create

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[10] Todd's Fifth Amendment privilege against self-incrimination existed at least until his conviction became final following imposition of sentence. See Mitchell v. United States, 526 U.S. 314, 326-27 (1999) ("Where the sentence has not yet been imposed a defendant may have a legitimate fear of adverse consequences from further testimony.").

a right to control trial sequence."); see also United States v. Mariscal, 939 F.2d at 886 ("A trial court does not abuse its discretion in refusing to accede to a codefendant's offer to testify when that offer is conditioned on his trial being completed first.") (citations omitted); United States v. Gay, 567 F.2d 916, 919-20 (9th Cir.), cert. denied, 435 U.S. 999 (1978) (district court did not abuse discretion in denying severance motions where co-defendant made conditional offer to testify for other defendants only if co-defendant were tried first).

Additionally, Petitioner has not shown that Todd would have provided "substantially exculpatory" testimony for Petitioner had the trials been severed. Regardless of Petitioner's hearsay evidence concerning what Todd purportedly told Petitioner and other inmates, Todd himself told the court that Todd was unaware of, and could not testify concerning, Petitioner's whereabouts during the incident, and that Todd had "no memory" of Petitioner during the incident (see R.T. 35). The Court of Appeal reasonably concluded that the record failed to show that Todd's testimony would have aided Petitioner. See Grisby v. Blodgett, 130 F.3d at 370 (rejecting claim where the proposed testimony "would not have clearly exonerated" petitioner); Mack v. Peters, 80 F.3d at 236 (showing that proposed testimony would be exculpatory insufficient where co-defendant produced two different statements, one inculpating petitioner and the other exculpating him).

For the foregoing reasons, the Court of Appeal's rejection of Petitioner's challenge to the trial court's refusal to sever was not contrary to, or an objectively unreasonable application of, any

clearly established Federal law as determined by the United States Supreme Court. See 28 U.S.C. § 2254(d); Harrington v. Richter, 131 S. Ct. at 785-87. Petitioner is not entitled to habeas relief on this claim.

RECOMMENDATION

For the foregoing reasons, IT IS RECOMMENDED that the Court issue an Order: (1) approving and adopting this Report and Recommendation; and (2) denying and dismissing the Petition with prejudice.

DATED: August 18, 2011.

/S/
CHARLES F. EICK
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in the Local Rules Governing the Duties of Magistrate Judges and review by the District Judge whose initials appear in the docket number. No notice of appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the judgment of the District Court.

If the District Judge enters judgment adverse to Petitioner, the District Judge will, at the same time, issue or deny a certificate of appealability. Within twenty (20) days of the filing of this Report and Recommendation, the parties may file written arguments regarding whether a certificate of appealability should issue.